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Supreme Court of the United States

October Term 1976

No. 76-297

LEE A. TURZILLO and
LEE TURZILLO CONTRACTING CO.
Petitioners,

vs.

P & Z MERGENTIME
Respondent.

REPLY BRIEF IN SUPPORT OF CERTIORARI

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September 27, 1976

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The significant importance of this case in the administration not only of the patent system but of appellate review in substantially every case headed for the appellate courts is not to be glossed over by assertions of respondents concerning:

I. A "case or controversy"—which most assuredly this case presents in almost pure form. The case involves no challenge to the facts but concerns solely issues of law that determine the fate of property and the proper limits of appellate review.

II. The trial court's asserted failure to "grapple with" a prior Phares patent. The trial court "closely," as the trial court put it, examined "the prior art *including Phares*"* (A30), adjudged Phares did *not* anticipate (A32), found Turzillo was "patentably distinct from Phares" (A33) and in five pages of findings (A29-A33)

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*Emphasis supplied throughout.

made clear that "Phares is *not* a [35 U.S.C.] 102 reference" (A30), and "is no better than the art considered and rejected" by the examiner (A33) who had "*all* of the most pertinent art before him." (A29). The trial court considered "Phares was unworkable" (A33) and found it unrefuted that "the Phares device has never been successfully used commercially in the United States." (A33) In short, Turzillo "eliminated a technological block in the practical implementation of the prior art." (A33).

III. The claimed policy in this Court not to review patent cases. Respondent ignores:

(a) This is no ordinary patent case; it presents instead problems that deeply affect the judicial process of review.

(b) There are no "second class" cases in this Court. A patent case, surely, as any other, will be reviewed if it presents problems that call for supervision by this Court—as does this case.

Here the Court of Appeals, unable to adjudge *any* finding "clearly erroneous" has merely substituted its views for the findings of the trial court.

Whether that is the approved way for appellate courts to resolve matters this Court should say. If appellate dockets are to be brought under control, clear determination of policy is needed concerning the division of labor between trial and appellate courts.

As is pointed out in WRIGHT ON FEDERAL COURTS (3rd edition, 1976), it *is* important to distinguish the essential nature of trial courts from appellate courts, *and* (Ch. 10, §96, p. 480):

> "Even in instances where an appellate court is in as good a position to decide as the trial court, it should not disregard the trial court's finding, for to do so impairs confidence in the trial courts and multiplies appeals with attendant expense and delay."

This case presents the opportunity to do something about that problem and the avalanche that threatens to overwhelm the appellate system.

Respectfully submitted,

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